FILE
MAY 6 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

NO. 73-1656

TERRY GENE SIMMONS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

JIMMY JAMES
620 Houston Bar Center Building
Houston, Texas 77002
227-8191

Counsel for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
OPINION BELOW	1
JURISDICTION	19
QUESTION PRESENTED	19
STATEMENT OF THE CASE	19
REASONS FOR GRANTING THE WRIT	20
1. The prosecution improperly suppressed exculpatory evidence relating to the critical issue of identification of the Petitioner	20
2. The Court below erred in failing to grant the Defendant's motion to suppress his confession because it was tainted by his illegal detention resulting from his illegal arrest	25
3. The Court below erred in overruling Petitioner's motion to suppress his confessions which were taken in the planned absence of counsel	36
4. The Court below erred in refusing to suppress the Petitioner's confession in view of the evidence which showed it to be involuntary and inadmissible as a matter of law	39
CONCLUSION	47

INDEX OF AUTHORITIES

CASES

	Page
Acosta v. Beto, 297 F. Supp. 89 (S.D. Tex., 1969)	28
Aguilar v. Texas, 378 U.S. 108 (1964)	29
Ashley v. Texas, 319 F.2d 80 (5th Cir., 1963)	23, 24
Barnes v. Texas, 380 U.S. 253 (1965)	25
Beecher v. Alabama, 389 U.S. 35 (1963)	39
Brett v. United States, 377 F.2d 520 (5th Cir., 1967)	25
Brinegar v. United States, 338 U.S. 160 (1949)	25
Brooks v. Florida, 389 U.S. 413 (1968)	39
Brown v. Mississippi, 297 U.S. 278 (1936)	39
Brown v. United States, 186 U.S. 532 (1897)	39
Clewis v. Texas, 386 U.S. 707 (1967)	33, 35, 39, 44
Collins v. Beto, 348 F.2d 832 (5th Cir., 1965)	30
Collins v. State, 352 S.W.2d 841 (Tex. Crim. App., 1962)	33, 42
Commonwealth v. Harmon, 269 A.2d 744 (Pa., 1970)	34
Commonwealth v. Moses, 387 A.2d 136 (Pa., 1972)	34
Davis v. Heyd, 350 F. Supp. 958 (E.D. La., 1972)	24

CASES

	Page
Davis v. North Carolina, 384 U.S. 907 (1966)	39
Fay v. Noia, 372 U.S. 391 (1963)	42
Fernandez v. State, 353 S.W.2d 434 (Tex. Crim. App., 1962)	33, 42
Gallegos v. Colorado, 370 U.S. 49 (1962)	33, 44
Gilbert v. Beto, 274 F. Supp. 847 (S.D. Tex., 1968)	33
Gilpin v. United States, 415 F.2d 638 (5th Cir., 1969)	31, 32, 41
Giordinello v. United States, 357 U.S. 480 (1958)	25
Gonzales v. Beto, 425 F.2d 963 (5th Cir., 1970)	28
Greenwald v. Wisconsin, 390 U.S. 519 (1968)	39
Haley v. Ohio, 322 U.S. 596 (1948)	33, 44
Harney v. United States, 407 F.2d 589 (5th Cir., 1969)	33, 38
Harris v. Beto, 367 F.2d 567 (5th Cir., 1966)	33
Haynes v. Washington, 373 U.S. 503 (1963)	39
Henley v. State, 228 So.2d 602 (Miss., 1969)	40
Henry v. United States, 361 U.S. 98 (1969)	25, 29
Ker v. California, 374 U.S. 23 (1963)	25
Logner v. North Carolina, 260 F. Supp. 970 (M.D.N.C., 1966)	31, 40
Lynumn v. Illinois, 372 U.S. 528 (1963)	42
Malloy v. Hogan, 378 U.S. 1 (1964)	39
Miranda v. Arizona, 384 U.S. 476 (1966)	31, 35, 36, 37, 38, 40
Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972)	24
Napue v. Illinois, 360 U.S. 264 (1959)	23
Payne v. Arkansas, 356 U.S. 560 (1968)	35
Phelps v. Decker, 401 F.2d 232 (5th Cir., 1968)	30
People v. Burton, 491 P.2d 793 (Cal., 1972)	34
Rogers v. Richmond, 365 U.S. 534, 540 (1961)	39
Shenk v. Ellsworth, 293 F. Supp. 26 (D.C. Mont., 1968)	46
Spano v. New York, 360 U.S. 322 (1959)	45
Smith v. State, 455 S.W.2d 748 (Tex. Crim. App., 1970)	24
Spinelli v. United States, 393 U.S. 410 (1969)	29
Townsend v. Sain, 372 U.S. 293 (1963)	33
United States v. Bayer, 331 U.S. 532 (1946)	38
United States v. Hollis, 450 F.2d 1207 (5th Cir., 1971)	30, 40
United States v. Myers, 450 F.2d 232 (3rd Cir., 1971)	29
United States v. Pierce, 397 F.2d 131 (4th Cir., 1968)	38
United States v. Quimones, 452 F.2d 1964 (10th Cir., 1971)	30, 40
United States v. Ventresca, 380 U.S. 102 (1965)	29
United States v. Watson, 469 F.2d 362 (5th Cir., 1972)	31, 41
United States ex rel Kern v. Maroney, 275 F. Supp. 435 (W.D. Pa., 1967)	46
Webb v. State, 291 S.W.2d 331 (Tex. Crim. App., 1956)	34
Westover v. United States, 384 U.S. 496 (1966)	38
Wong Sun v. United States, 371 U.S. 471 (1963)	29, 30, 35
Woods v. State, 466 S.W.2d 741 (Tex. Crim. App., 1971)	29

IN THE

Supreme Court of the United States

NO._____

TERRY GENE SIMMONS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, Terry Gene Simmons, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered in this proceeding on January 23, 1974.

OPINION

The opinion of the Texas Court of Criminal Appeals, was rendered on January 23, 1974. Appellant motion for lead to file was denied on February 13, 1974, thus the judgment became effective as of that date.

TERRY GENE SIMMONS, Appellant

NO. 46,966

v.

THE STATE OF TEXAS, Appellee
Appeal from HARRIS County

OPINION

This appeal is from a conviction of murder with malice. Punishment was assessed at ninety-nine (99) years and a day.

The record reflects that on August 2, 1971, during the afternoon, the home of Mrs. Margaret Cook in Houston was burglarized. The next morning, Mrs. Cook left her home at about 9:00 A.M., leaving her daughter Martha, 16 years old, asleep in bed. The doors were locked when Mrs. Cook left the house. At about 12:15 P.M., Mrs. Cook returned to her home. She found the utility room door unlocked, the phone off the hook, the television set gone, the sheets were off of Martha's bed, and Martha was gone. Mrs. Cook never saw her daughter, Martha, alive again.

On August 6, 1971, appellant was arrested for the burglary of the Cook home. While in custody, and after being duly advised of his rights by a magistrate and the arresting officers, he admitted orally to the burglaries and to being surprised during the second burglary by deceased, and to killing her by drowning her in water. He directed the officers to a point on Green's Bayou in Harris County where he said he had tied her hands together behind her back, tied the stolen television set to her body, and had thrown her, while alive, into the bayou and had sat on

her until she died. The body of Martha Cook, with her hands tied behind her, was subsequently, found by the officers floating in the running stream about three miles from the spot where appellant admitted placing her in the water.

After appellant was returned to the police station he made a written confession to practically the same facts as he had previously orally admitted.

A qualified pathologist performed an autopsy, and testified that deceased died as the result of drowning, and that the partially decomposed condition of parts of the body were consistent with exposure in the water for a period of three to four days.

Appellant's initial complaint is that the court erred in denying a motion to quash the indictment because of systematic exclusion of qualified persons of 18 to 20 years old from service on the grand jury in Harris County. The indictment in this case was returned on August 17, 1971, at a time when persons under the age of 21 years were not authorized to vote in Texas, and, therefore, were not eligible to sit on grand juries. *Tibbetts v. State*, 494 S.W. 2d 552; Art. 19.08, V.A.C.C.P. In *Tibbetts*, we determined that Art. 5.10, Vernon's Ann. Tex. Election Code, reducing the minimum voting age to 18 years, became effective August 30, 1971, and held that only since that date have citizens between 18 and 21 years of age been eligible to qualify as grand jurors. See also *Shelby v. State*, 479 S.W.2d 31; *McCrea v. State*, 494 S.W.2d 821.

The first ground of error is overruled.

Appellant's second complaint is that the trial court erred in allowing the State, over objection, to challenge for cause prospective jurors with conscientious scruples

against inflicting the death penalty, citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. In *Solis v. State*, 492 S.W.2d 561, we held that *Witherspoon* is not applicable where the death penalty is not imposed, citing *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797; *Hinkle v. State*, 442 S.W. 2d 728; *Parks v. State*, 437 S.W.2d 554. See, also, *Askridge v. State*, 493 S.W.2d 928. The ground of error is without merit.

Appellant's grounds of error numbers three, four and five relate to the admission and voluntariness of his confession. The grounds are as follows:

> "Defendant's Point of Error No. 3
>
> "The trial court erred in refusing to suppress the defendant's confession in view of the evidence which showed it to be involuntary and inadmissible as a matter of law."
>
> "Defendant's Point of Error No. 4
>
> "The trial court erred in overruling defendant's motion to suppress his confessions which were taken in the 'planned absence of counsel'."
>
> "Defendant's Point of Error No. 5
>
> "The trial court erred in failing to grant the defendant's motion to suppress his confession because it was tainted by his illegal detention resulting from his illegal arrest."

Prior to the trial, appellant filed his motion to suppress any oral and written confessions made by appellant. During the trial, and prior to the offering by the State of any testimony concerning confessions, a hearing was had before the court in the absence of the jury on such motion

to suppress. The record of this hearing covers three hundred pages of testimony and many exhibits.

The evidence adduced at the hearing reflects that appellant was arrested on an arrest warrant at his home in Houston about 7:35 P.M. on August 6, 1971. At that time, he was charged with burglary of the Cook home on August 3. The arresting officers at the time of the arrest read to appellant the "blue card" Miranda type warning,[1] and according to their testimony same was fully explained to him, and he told them that he fully understood. Appellant was taken to a magistrate within 30 minutes after his arrest who read and explained to him his rights as provided by Art. 15.17, V.A.C.C.P. Appellant was asked by the magistrate if he understood the warning, and he replied that he did. Appellant was then taken to the police station, where officers interrogated him. He was again given the "blue card" warning by officers, which included his rights to counsel, and to remain silent, and was asked if he wished to use a telephone. He stated he did not want to have a lawyer, and did not care to make a phone call. At first he denied his guilt, and at about 9:30 P.M. agreed to take a lie detector test. When he was taken to the polygraph room preparatory to executing a written agreement, and after the lie detector test was explained to him, he admitted his guilt of the burglary and murder orally to the polygraph operator. He stated that he had gone to the Cook home on his bicycle on August 2nd, entered it, and stolen some money. He returned in his mother's car on the next morning to get a television set. While in the house, he was surprised by the deceased, Martha Ann Cook. He tied her to the bed with some electrical cord, then, fearing

1. The blue card containing the Miranda warning was made an exhibit, as is contained in the record.

that she could identify him and that she had seen the car license, he took her and the television set to a place on Green's Bayou in Harris County, tied her hands behind her back and to the television set, and rolled her into Green's Bayou, where he sat on her until she drowned. Appellant then offered to take the officers to the place where he had drowned deceased.

According to the evidence of the peace officers, shortly after 11:30 P.M., appellant, in a car with several officers, directed the officers to a location on Green's Bayou which he described as the place where he drowned deceased. After a search, a knob from a television set, identified as similar to that stolen from the Cook home, was found on the bank of the stream. Subsequently, on the afternoon of August 7, as the result of the information furnished by appellant, the body of deceased was found about three miles down stream from the spot where the search started. Her hands were tied behind her back, and the body was partially decomposed.

At about 1:00 A.M. on August 7, hours before the body was found, appellant was taken back to the police station, where the Miranda warning was again given him by the investigating officers. He was asked if he wanted to have a lawyer present, and he expressly waived the presence of one, as well as the other rights specified in the warning. Thereafter, appellant agreed to make a written statement and did make one, confessing to the commission of the burglaries of the Cook home on August 2nd and 3rd, the taking of deceased to Green's Bayou, and the drowning of deceased, practically as he had stated in his previous oral confession. The confession, containing the usual warning and waiver of rights, was typed, read to appellant, who stated that he under-

stood it, and signed by him in the presence of two television newscasters, who witnessed the signing.

Appellant testified at the hearing. He stated that he had been taking heroin with regularity about two and a half years. He went to a methadone clinic in Fort Worth in May, 1971, and received treatment; however, he remained an addict. He had an overdose of heroin on the evening of August 4, 1971, and was taken to a hospital. He was arrested there on a heroin charge, and made bond on August 5. His last "shot" of heroin prior to his arrest on August 6 was on the afternoon of the previous day. He was beginning to feel the need of another shot while under arrest at about 9:30 P.M., and started suffering the symptoms of heroin withdrawal. He remembered being arrested on August 6, and of being warned of his rights by the magistrate, and of being questioned by police officers. He had not anything to eat from noon, August 6, until 3:30 or 4:00 the next morning. He asked to get in touch with his mother, but his request was ignored. He knew he had a lawyer in his heroin case, but did not ask to talk to him. He made no complaints of heroin withdrawals symptoms to the officers. He denied having volunteered to take a lie detector test. He testified that he had denied participating in the burglary case, and of any knowledge of the whereabouts of Martha Ann Cook, until he was taken in the polygraph room, and that he was influenced to make the statement he made by the heroin withdrawal symptoms and the presence of the polygraph machine, and by the statements of the operator that he had left fingerprints in the Cook home, and that money stolen from that home traced to him. He stated that he was forced to take the officers out to Green's Bayou, and denied agreeing to do so. He said the officer

taking the oral confession agreed to drop the heroin charge if he would admit the burglary of the Cook home. He denied having made any confession voluntarily.

Attorney John Swain, a defense witness, testified that he was employed on August 5 to represent appellant on the heroin charge. About 9:30 P.M. on August 6, while he was at a social event, he was notified of appellant's arrest. The witness went to his home and called the police department. He did not remember whether he talked with a lady or man, but he testified that he was told that the party he was talking with didn't know whether appellant had been "talked with," and that he was either asleep or in a cell for the night. Swain told the party he would come to the station the next morning, and hung up. He went to the jail on the morning of August 7th, and learned of the confessions. He stated that he was never denied the right to see and talk with appellant.

A licensed polygraph operator, in answer to a hypothetical question which assumed the truth of the testimony given by appellant, and also included certain testimony of State's witnesses, testified that under the facts as stated in such question, in his opinion, appellant would have been likely to have his resistance to confess overborne when confronted with the polygraph machine.

Dr. Samuel George, a psychiatrist, testified in answer to a hypothetical question which assumed the truth of appellant's testimony, that in his opinion a person as described in the question would not be aware of what he was agreeing to, and not able to withstand interrogation.

Dr. Raeburn corroborated appellant's testimony that appellant was in his methadone clinic in Fort Worth; however, he fixed the date as June 12, 1971.

For the State, a number of peace officers who had had experience in dealing with persons under the influence of heroin, and who had participated either in the arrest of appellant on August 6 or the subsequent interrogation of him during that night, testified that they noticed nothing about appellant's appearance or actions which might indicate that he was suffering from heroin withdrawal symptoms. The news broadcasters who witnessed the confession also testified to this effect. In the opinions of these officers and witnesses to the statement, appellant was not suffering from such symptoms.

In his written findings of fact and conclusions of law, the court found that, prior to the making of the oral and written confessions, appellant was taken without unnecessary delay before a magistrate, who properly warned him of his rights as provided in Art. 15.17, V.A.C.C.P., and that he was again advised of his rights prior to making the oral and the written confession by the officers to whom such confessions were made. The court found that the oral confession contained statements of fact leading to the finding of the body of deceased. The court found that both statements were voluntarily given in accordance with law, and that they were admissible in evidence.

The record contains ample evidence to support the findings of the trial court, who, as the trier of the facts at the hearing, was free to disbelieve defense testimony. *Gutierrez v. State,* ____ S.W.2d ____, (No. 46,904, Dec. 19, 1973); *Chivers v. State,* 481 S.W.2d 125. There was sufficient evidence for the court to conclude that the statutory and the Miranda type warnings were adequately and timely given appellant, and understood by him; that appellant was capable of making and did knowingly make an intelligent and voluntary waiver, and that neither the

oral nor the written confession was obtained by means of a "third degree" interrogation. As to the oral confession, the evidence discloses that the body of deceased was found as the result of the information furnished by appellant, and that he voluntarily directed the officers to the area in which the body was found about three miles down stream from where appellant stated he had thrown it in the flowing bayou. Under the evidence, the court properly admitted it. Art. 38.22, Sec. 1(e), V.A.C.C.P.; *Chase v. State,* ____ S.W.2d ____, (No. 46,796, Jan. 16, 1974); *Stelman v. State,* 58 S.W.2d 831.

Appellant contends that his confessions were "tainted by his illegal detention resulting from his illegal arrest." He argues that the affidavit upon which the warrant of arrest was based was insufficient to show adequate cause. It is not necessary that we decide the sufficiency of the affidavit. "A confession otherwise shown to have been voluntary is not rendered inadmissible by the fact that its author was under arrest or in custody at the time, even though the arrest may have been under invalid process or without any process or legal right." *Morgan v. State,* ____ S.W.2d ____, (No. 46,831, Dec. 5, 1973), citing *Lacefield v. State,* 412 S.W.2d 906. An examination of the evidence supra, reflects that there was ample reason to detain appellant, and his detention did not vitiate the confessions. *Hughes v. State,* 409 S.W.2d 416; *Dugger v. State,* 402 S.W.2d 178.

Appellant further complains that the confessions were taken in the "planned absence of counsel." The evidence of attorney Swain, a defense witness, heretofore summarized, does not support this contention. Swain testified that when he heard of the arrest of appellant he went to his (witness's) home, phoned the jail, did not know to

whom he was talking, but that person told him he (or she) did not know whether appellant had been questioned, and that he was in his cell, and that Swain told this person he would be down in the morning. No further investigation was made that night by him.

The record shows that appellant understood his rights concerning legal representation, and the, so understanding, he on several occasions while under arrest and knowingly expressly waived such right. See *Nash v. State*, 477 S.W.2d 557.

Appellant in his brief makes a number of specific complaints which he says rendered the confessions inadmissible. We have given each of them careful consideration, and find them to be without merit.

Grounds of error three, four and five are overruled.

In his ninth ground, appellant alleges error in the court's failure to include the words "or any evidence obtained as a result of the confession or statement" in his charge on the issue of the voluntariness of appellant's confessions.

Appellant requested that the charge include an instruction on the fact issue of voluntariness of the confession that unless the jury believed beyond a reasonable doubt that the confession was voluntarily made, it could not consider the confession or statement for any purpose, nor could the jury consider the confession or statement for any purpose, *nor could the jury consider any evidence obtained as a result of the confession or statement*. See Art. 38.22, Sec. 2, V.A.C.C.P. The court did charge on the issue of voluntariness as provided in said Article, except the charge did not include the phrase "nor could the jury consider

any evidence obtained as a result of the confession or statement."

The appellant did not testify before the jury. Although medical testimony was introduced of the effects of the excessive use of heroin by way only of hypothetical questions, there was no evidence before the jury that appellant was suffering from such use during the time he was under arrest. We have carefully searched the record, and we do not find any evidence admitted before the jury raising the issue of voluntariness. Although the cautious trial judge at appellant's request did charge on this issue, it would not have been error if he had failed to do so. *Morgan v. State,* ____S.W.2d____, (No. 46,831, Dec. 5, 1973); *Flanagan v. State,* 476 S.W.2d 755; *Mosley v. State,* 494 S.W.2d 557. Hence the court did not err in failing to instruct the jury as alleged in the ninth ground of error.

In his tenth ground, appellant complains because the court refused to charge on the presumption of involuntariness with reference to an initial finding of involuntariness of a prior confession. Appellant relies on *Cavazos v. State,* 172 S.W.2d 348. In this case, the court, after finding that a prior confession was inadmissible because not voluntarily made, reversed because of the failure to give such charge.

However, in the instant case we have failed to find evidence raising the jury issue of involuntariness of appellant's oral confession. *Cavazos,* supra, is not applicable, and the court did not err in refusing this charge.

In his sixth ground, appellant says that the court erred in permitting the State to make its opening statement to the jury after having presented evidence. The record shows that prior to the commencement of the trial the court had granted appellant's request to require the state

to make an opening argument, as provided in Art. 36.01, V.A.C.C.P. The State, nevertheless, without objection placed the witness Mrs. Margaret Cook on the stand, and after brief testimony the court stopped the proceedings, and in the absence of the jury asked appellant's counsel if he wished the State to make its opening statement. Counsel refused to take a position, and the court directed the State to make an opening statement to the jury. This was then done over appellant's objection. We perceive no error in the court's action. See *Hill v. State,* 403 S.W.2d 421; *Bell v. State,* 190 S.W. 732; *Cannon v. State,* 208 S.W. 660. The ground of error is overruled.

In his seventh ground, appellant complains of the admission in evidence, over objection, of extraneous burglary and theft offenses and an extraneous marihuana offense.

The burglary and theft offenses complained of occurred the day before the murder, as shown by appellant's oral and written confession. He first burglarized the Cook residence on August 2, 1971, and returned on August 3rd to get property he couldn't carry away on his bicycle the preceding day. It was on the occasion of the second burglary that he was surprised by the deceased, and took her off and drowned her. Evidence so interconnected with the commission of the instant offense cannot be separated, and is admissible as res gestae to show the context in which the murder occurred. *Albrecht v. State,* 486 S.W.2d 97; *Johnson v. State,* 379 S.W.2d 914; *Robbins v. State,* 387 S.W.2d 62.

As to extraneous narcotics cases, the State, in questioning one of the officers concerning the making of the written confession by appellant, inquired whether the

officer told appellant that if he made a statement the marihuana case would be dismissed. Immediately prior thereto, the State had made the same inquiry with reference to a heroin case, which was answered in the negative by the witness without objection. The appellant did object to the question concerning a promise to dismiss a marihuana case, and such question was not answered. The court instructed the jury not to consider this question, but overruled a request for a mistrial. We perceive no error in the court's ruling. In view of the fact that appellant introduced evidence by appellant's mother of the narcotics violation, no harm resulted from the State's question. *Beard v. State,* 481 S.W.2d 875; *Kenner v. State,* 456 S.W.2d 921. The seventh ground of error is overruled.

The eighth contention is that the prosecution suppressed exculpatory evidence relating to the critical issue of identification of appellant. Appellant made a timely pretrial request for discovery of exculpatory evidence pursuant to Art. 39.14, V.A.C.C.P., and *Brady v. Maryland,* 378 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

In this case, the witness who appellant claimed was known to the State but was not disclosed to appellant was discovered by appellant before the end of the testimony, and testified at length as a defense witness. We quote as follows from the opinion of Judge Onion, speaking for the Court in *Means v. State,* 429 S.W.2d 490, 496:

> "If appellant's counsel, of course, actually knew the facts which were withheld, appellant cannot now seek relief on the basis of the State's failure to disclose the same facts. See *Thomas v. United States,* 343 F.2d 49 at pp. 54-55, 9th Cir., 1965; *United States ex rel. Thompson v. Dye,* 221 F.2d 763 at p. 767, 3rd Cir., Cert. denied, 350 U.S. 875, 76 S.Ct.

> 120, 100 L.Ed. 773. Therefore, even if we were to conclude that the actions of the State's attorney constituted suppression of the evidence, which may have had an effect on the outcome of the trial, still reversible error is not shown in view of the fact that appellant has failed to show that he did not know the results of the test involved before the receipt of the jury verdict at this one stage trial."

See, also, *Chappel v. State,* 489 S.W.2d 923; *Graham v. State,* 486 S.W.2d 92; *Harris v. State,* 453 S.W.2d 838; *Evans v. State,* 444 S.W.2d 641.

Under the circumstances of the instant case, the eighth ground of error is overruled.

The thirteenth ground alleges error in the failure of the court to instruct the jury concerning the offense of murder without malice at the guilt stage.

Since the court at the guilt stage charged on murder with malice, he should have given a charge on murder without malice if such issue was raised by the evidence. *Lucky v. State,* 495 S.W.2d 919. The charge on murder without malice is mandatory only in cases where there is evidence that the defendant acted under the immediate influence of sudden passion arising from an adequate cause. Art. 1257c, V.A.P.C.; *Machado v. State,* 494 S.W.2d 859; *Corbett v. State,* 493 S.W.2d 940; *McGee v. State,* 473 S.W.2d 11; *Garza v. State,* 479 S.W.2d 294. We find no evidence in the record requiring a charge on murder without malice. The ground of error is overruled.

In his eleventh, twelfth and fourteenth grounds, appellant claims error in the court's failure to charge the jury that police officers are to be tested by the same standards of credibility as other witnesses; failure to instruct the

jury on the weight to be given testimony of expert witnesses; and failure to instruct that the jury should not be influenced by the number of objections raised by defense counsel.

The court gave the customary instructions that the jurors were the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony. These requested charges, if given, would have been on the weight of the evidence, and were properly refused.

The fifteenth ground alleges that the court erred in refusing to charge at the punishment stage, pursuant to Art. 36, V.A.P.C., that the jury could consider intoxication produced by the voluntary use of dangerous drugs, narcotics, or a combination thereof, in mitigation of punishment.

The instruction requested by appellant and refused by the court concerned the appellant being in a state of temporary insanity at the time of the offense. The objection was directed at the failure to submit a charge on temporary insanity.

The record in this case contains over two thousand pages of testimony. Appellant, in his half page devoted to this ground, has failed to specify or direct us to the testimony which, as he contends, raises an issue of temporary insanity at the time of the commission of the offense. As stated by Presiding Judge Onion, speaking for the Court, in *Thomas v. State,* 468 S.W.2d 90, on p. 91:

> "This Court, with its heavy case load, should not be compelled to search through a record while specu-

> lating just what evidence the appellant might have in mind. *McElroy v. State,* Tex. Cr. App., 455 S.W.2d 223. Nothing is presented for review."

See, also, Art. 40.09, V.A.C.C.P.

The fifteenth ground of error is overruled.

In his sixteenth ground, appellant contends the court erred in refusing to grant his motion for a mistrial after the prosecutor injected an extraneous offense into his final argument at the guilt stage. The part of the argument objected to was a remark of the prosecuting attorney wherein he stated: "I don't know whether it (the autopsy) would show whether Martha Cook was raped or not . . ." An objection to this argument was sustained, and the jury was told to disregard it. A motion for a mistrial was overruled.

In his confession, appellant stated that after he had been surprised by Martha Cook's appearance in the home that he was burglarizing he tied her to the bed. She was dressed in her nightgown.

The error, if any, was rendered harmless by the prompt admonishment of the court to the jury to disregard this statement. *Hunnicutt v. State,* ____S.W.2d____, (No. 46,800, October 10, 1973); *Bothwell v. State,* ____S.W.2d ____, (No. 46,752, October 10, 1973; *Abels v. State,* 489 S.W.2d 910.

The sixteenth ground of error is overruled.

In his last ground, appellant contends that the court erred in refusing to allow him to introduce evidence at the punishment stage of his good reputation as a peaceable, law abiding citizen in the community in which he

resides, up to August 3, 1971. It was stipulated by the State and appellant that the character witnesses offered by appellant would have answered that such reputation, up to August 3, 1971, the date of the commission of the offense, was good.

At the punishment stage, the reputation of appellant as a peaceable, law abiding citizen, to the date of the trial, was in issue, and evidence on such issue was admissible. Art. 37.07, Sec. 3 (a), V.A.C.C.P., provides that at the punishment stage evidence is admissible of "his general reputation, and his character. . . ." The general reputation mentioned has been construed by this Court as being his general reputation to the date of the trial. *Wright v. State*, 491 S.W.2d 936; *Frison v. State*, 473 S.W.2d 479; *Ballew v. State*, 452 S.W.2d 460; *Broadway v. State*, 418 S.W.2d 679.

The appellant apparently was unwilling to inquire of his witnesses concerning his reputation to the date of the trial. He wished to limit his question to a date long prior thereto, the date of the commission of the crime. This procedure would have been relevant on the guilt phase, as bearing on the probability or improbability of his performance of the offense. But it has no bearing on the issue of mitigation of punishment. We repeat that it is the reputation prior to and at the time of trial which is material and relevant on the matter of punishment. The seventeenth ground of error is overruled.

The judgment is affirmed.

Green, Commissioner

(Delivered January 23, 1974)

Opinion approved by the Court

JURISDICTION

The judgment of the Court of Criminal Appeals was entered and delivered on January 23, 1974. A timely motion for leave to file a motion for rehearing was denied on February 13, 1974, and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether or not the prosecution improperly suppressed exculpatory evidence relating to the critical issue of identification of the Petitioner.

2. Whether or not the Court below erred in failing to grant the defendant's motion to suppress his confession because it was tainted by his illegal detention resulting from his illegal arrest.

3. Whether or not the Court below erred in overruling Petitioner's motion to suppress his confessions which were taken in the planned absence of counsel.

4. Whether or not the Court below erred in refusing to suppress the Petitioner's confession in view of the evidence which showed it to be involuntary and inadmissible as a matter of law.

STATEMENT OF THE CASE

On August 6, 1971, Petitioner was arrested for the burglary of the home of Mrs. Margaret Cook in Houston, Texas (R-1651). While in custody, Petitioner made an oral and written confession regarding the disappearance and death of Mrs. Margaret Cook's daughter, Martha.

Petitioner was tried before a jury and was convicted of murder with malice. Punishment was assessed at ninety-nine (99) years and a day.

REASONS FOR GRANTING THE WRIT

1. The prosecution improperly suppressed exculpatory evidence relating to the critical issue of identification of the Petitioner.

2. The Court below erred in failing to grant the Defendant's motion to suppress his confession because it was tainted by his illegal detention resulting from his illegal arrest.

3. The Court below erred in overruling Petitioner's motion to suppress his confessions which were taken in the planned absence of counsel.

4. The Court below erred in refusing to suppress the Petitioner's confession in view of the evidence which showed it to be involuntary and inadmissible as a matter of law.

REASON FOR GRANTING THE WRIT

1. THE PROSECUTION IMPROPERLY SUPPRESSED EXCULPATORY EVIDENCE RELATING TO THE CRITICAL ISSUE OF IDENTIFICATION OF THE PETITIONER.

The record will reflect that the defense was able to avail itself of the testimony of a witness, Mrs. Janice Arnold. The testimony of Mrs. Arnold indicates that on Wednesday, August 4, 1971, she stopped at a service station in the vicinity of Houston, Texas, and while in the

ladies room spoke to a "sobbing girl" who asked her to "please help me" (R-2300). Mrs. Arnold identified this girl from several photos as the decedent, Martha Ann Cook (R-2302). According to the testimony of Mrs. Arnold, the Cook girl was with an unknown woman and a man that Mrs. Arnold later identified as Ernest Ira Fields (R-2323). Significantly the record reflects that the police had advance information that the said Fields was in the area to attempt a kidnapping of a girl (R-2323). Mrs. Arnold further testified that in the back seat of the automobile in which Martha Ann Cook, Fields and the unknown woman were riding, there appeared to be an object that could have been a television set (R-2301). If the object was in fact a television set, it provides a causal link with the television electrical cord that bound the decedent's hands. Of greater significance is the fact that this entire incident took place within possibly three miles of where the decedent's body was found (R-2325).

At first blush, it might appear that there has been no improper suppression of evidence due to the fact that the evidence in question was adduced before the trier of fact. The Petitioner's position is that prejudice did occur due to the fact that the existence of Mrs. Arnold and her testimony was either knowingly or negligently suppressed by the prosecution until the very latter stages of trial and was then only revealed because of the fact that the State's investigators disclosed the existence of the Arnold woman's report during their testimony on cross-examination at trial by the defense.

The defense made a timely pre-trial request pursuant to Art. 39.14, V.A.C.C.P., for exculpatory evidence known to the prosecutor or contained in his file (R-15).

The record reflects that the defense counsel first became aware of the existence of Mrs. Arnold's exculpatory evidence when he was given an offense report by Officer Ward. (R-2018). The offense report is contained in the record for the Court's consideration (R-2798). Indeed, defense counsel, when given the offense report, stated "This is the first time I have ever seen this" (R-2020). Defense counsel thereafter obtained the remaining portions of that report (R-2021). Insofar as the prosecutor's motivations for previously having suppressed the existence of Mrs. Arnold's exculpatory testimony, we can only take his word that he felt that her testimony was a "blind lead" (R-2020). The record therefore reflects that the remaining portions of that report were in the possession of the prosecutor, Frederick Stover. This offense report is in the record as Court's Exhibit No. 7 (R-2799). In response to the defense's request for an instanter subpoena for the remaining portion of the offense report covering Mrs. Arnold's statement, prosecutor Stover supplied the report from his file (R-2020). Subsequently, the defense called Officer Turbeville of the Houston Police Department who stated that he questioned a Mrs. Arnold on August 4, 1971 (R-874). Officer Turbeville stated that he did not know if Mrs. Arnold could identify Martha Ann Cook, the deceased (R-2291). At this point, the defense petitioned the court for permission to reopen its case in order to call Mrs. Janice Arnold to determine the nature of her testimony (R-2297). The court did permit the defense to reopen its case to elicit the exculpatory evidence of Mrs. Janice Arnold (R-2297). During her testimony, Mrs. Arnold stated positively that no one representing the Petitioner had ever contacted her previously (R-2298).

Does the fact that the defense was able to procure the testimony of Mrs. Arnold and produce it for the jury's consideration cure the prosecutor's misconduct in suppressing such evidence until the very latter portion of the trial? It has been explicitly recognized that suppression of evidence relates not only to the right of the defense to utilize such evidence in conducting the defense but also, to utilize it in *planning the defense*. The court in the case of *Ashley v. Texas,* 319 F.2d 80 (5th Cir., 1963) stated: "We conclude that . . . is of such vital significance to the accused persons in *planning and conducting* their defense, the failure of the district attorney to inform their counsel of this fact amounts to such a fundamental unfairness in the trial of a criminal case as to amount to a denial of due process".

The fact that the existence of Mrs. Arnold and the exculpatory testimony which she could offer was ultimately disclosed through the diligence of counsel at the end of the trial and after both sides had rested does not cure the prosecutor's misconduct in depriving the defense of this information pursuant to its request in order that the defense could adequately prepare and plan its case with the knowledge that the testimony of Mrs. Arnold existed. The defense cannot in retrospect guarantee this Court that if it had been aware of Mrs. Arnold's testimony before the trial that it would have revised its entire theory of the case. Any experienced lawyer, however would certainly recognize that the knowledge of the existence of such affirmative testimony would certainly have had an effect on the strategy of the case and in all likelihood would have had an effect on the outcome of the trial if presented smoothly as part of the defense's case in chief rather than after both sides had rested their case. See *Napue v. Illinois,* 360 U.S. 264 (1959).

The evidence before this Court indicates that the prosecutor had in his file offense reports made on August 4, 1971 revealing the existence of a witness whose testimony was highly exculpatory to the Appellant. The prosecutor failed to make a timely disclosure of this material information as requested by the defense. This evidence was material to the Appellant's case and its suppression violated the duty of candor imposed upon the prosecution in dealing with an accused criminal. See *Smith v. State*, 455 S.W.2d 748 (Tex. Crim. App., 1970). It was harmful error and it violated the fundamental concept of a fair trial which is essential to due process.

A conviction must be reversed if the prosecutor actively suppresses evidence which may exonerate the accused or be of material importance to the defense. Reversible error is also committed where the prosecutor negligently or inadvertently fails to disclose evidence which may exonerate the accused or which may be of material importance to the defense, even though not offered as testimony at the trial and even though the accused counsel is not diligent in his preparation for trial. The court decisions have emphasized the harm to the defendant rather than the prosecutor's motive in failing to disclose exculpatory evidence. See *Davis v. Heyd*, 350 F. Supp. 958 (E.D. La., 1972) as adopting *Ashley*, supra.

Therefore, in conclusion, your Petitioner asserts that the foregoing aptly complies with *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) as there was suppression violative of the principle laid down by this Court in *Ashley*, supra, that there was a request by Petitioner; and that the evidence was favorable and material to the defense.

2. THE COURT BELOW ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION BECAUSE IT WAS TAINTED BY HIS ILLEGAL DETENTION RESULTING FROM HIS ILLEGAL ARREST.

As a matter of law, there was no probable cause for the arrest of the Petitioner on August 6, 1971, by Officers of the Houston Police Department. An arrest with a warrant requires probable cause, i.e., facts related in the complaint or complaints or affidavits which are sufficient of themselves to warrant a man of reasonable caution to believe that an offense has been committed and the suspect committed the crime. See *Henry v. U. S.*, 361 U.S. 98 (1969); *Brinegar v. U.S.*, 338 U.S. 160 (1949); as applied to the states in *Ker v. Calif.*, 374 U.S. 23 (1963); *Brett v. U.S.*, 377 F.2d 520 (5th Cir., 1967). Therefore, if there is no probable cause in the affidavit, the warrant fails and the subsequent arrest based on that warrant is illegal. See *Giordinello v. U. S.*, 357 U.S. 480 (1958); *Barnes v. Tex.*, 380 U.S. 253 (1965).

The Petitioner, in the present cause, was arrested on the basis of an arrest warrant for a burglary alleged to have occurred on August 3, 1971. The sole basis for this warrant (R-1645, 1656, 1659) is reflected in the following affidavits which totally fail to indicate any semblance of probable cause, but merely establish that change in at a local market:

> "My name is Sheri Lynn Phillips. I am over 17 years old. I live at 4426 Nina Lee Street, Houston, Texas. My phone number is OV 1-3364. I live with my mother, step-father, 2 sisters, 1 brother and 1

step-brother. I attend Scarborough jr, sr, high school and am in the 12th grade.

Today, August 6, 1971 about 4:30 p.m., I was in the car with Ricky DeFalco, and we were going swimming, and were about 2 blocks from my house when I noticed that my step-brother Gary Wood had been stopped by the Police. I got Ricky to turn around so that I could see why Gary had been stopped. I got out of the car and walked over to my sister Lynette and asked her what had happened and she said that she didn't know; then I asked her if they were speeding, and she said 'No'. Then Sgt. Michna asked me my name and age, and whose car it was that my step-brother was driving. I told him, and then he said that I was the one that they were looking for. Then one of the Officers asked me who Ricky was and I said that he was my boyfriend. They asked me what his name was, and I told them. While I was talking with one Officer, another Officer was talking with Ricky. After the Officer that was talking to me was finished, I started toward Ricky's car and Sgt. Michna told me that I was to go with him, because they wanted to question me, and we were to follow Ricky and the other Officer around the corner at Watonga and 43rd Street. I hesitated to get into the car, because I did not know what this was all about at the time. FBI agent Haymes showed me his ID and then he showed me a picture of Martha Ann Cook, and asked me if I knew her. I told him that I recognized the picture and the name, but I did not know her personally. This girl attended the same school that I attend and this is how I recognized her and I had remembered hearing it on TV last night on the News. The Officers asked me if I know 'Butch Simmons', and how well I knew him, and they also asked me if I had gone to 'Foodland' with him. I said that I had. The Officers asked me if I knew that there had been a kidnapping and

Burglary, and I said that I had heard it on the TV News. The Officers asked me if 'Butch had a lot of half-dollars and I said 'Yes.'

I wish to make of my own free-will the following statement of what happened last Tuesday (August 3, 1971 approx. 3:30-4:30 p.m.):

Butch Simmons and David Dunnning came to my house and asked Ricky if he would take Butch to the store to get bills for some change that he had. Ricky said that he would and I got into the car with Butch, David and Ricky and we went to 'Foodland' on 43rd street. Butch told us that he had been working in grocery stores for the past three years and had been saving his tips and he decided to cash them in so that he could spend the money. We all went into the store. David went to get some cigarettes and went back to the car, we cashed in all of the change and left. Ricky took me home and said that he was taking Butch home and they left. I did not know anything about these coins other than what Butch told me, until today when the Officers told me that they had been taken in a Burglary.

I can read the English Language and the above statement is true and correct to the best of my knowledge.

R.L.A. 8-6-71—6:50 p.m."

"My name is Richard Anthony DeFalco. I am Nineteen years old. I live at 7927 Ravenwood Circle, Houston, Texas. My telephone number is 465-9493. I work at Aspen Springs Development Corporation, 11415 Chimney Rock, Houston, Texas. On Tuesday, August 3, 1971 around 4:00 p.m. I was over at Sherry Phillips house, located at 4426 Nina Lee Lane, Sherry and I were watching Television when Butch Simmons came to the house, and ask me if I would take him to the store. I ask him why he

needed to go to the store, and he told me that he had a bunch of coins that he wanted to get changed into Dollars. Around 5:00 p.m. I drove Butch to the Foodland Store located at 43rd and Rosslyn. Sherry Phillips, and David Dunning also rode to the store with Butch and I. All of us went inside the store, and went to the Courtesy Booth. Butch had a paper sack full of coins, and when he started counting the money out to the man at the Courtesy Booth I noticed that a lot of the money was Silver, so I asked Butch if he would give me two of the Silver Fifty cent pieces for a dollar bill, which he did. The man gave Butch Seventy dollars for the coins. Butch then gave the man One hundred dollar bills in exchange for some larger bills. After Butch got the money, I let him out of the car at the corner of 34th & T.C. Jester. I have not seen him since then.

I know nothing of any Burglary, and I came down to the Police Station on my own to make this statement. I can read the English Language and have read the above statement, and this statement is true and correct.

T.E.I.—7:00 P.M."

If officers fail to communicate any information later deemed necessary for finding probable cause, the error is irreparable. See *Acosta v. Beto,* 297 F. Supp. 89 (S.D. Tex., 1969) affirmed; *Gonzales v. Beto,* 425 F.3d 963 (5th Cir., 1970) cert. denied 400 U.S. 928 (1970).

The Affidavits admitted into evidence as State's Exhibits 21 and 22 (R-2708, 2709, 2710) and the complaint admitted as Defendant's Exhibit No. 2 (R-2736) are the sole bases for the warrant; (R-1656, 1659), as a matter of law, these instruments do not establish any

semblance of probable cause but merely establish the following:

1. Both Affiants state *Butch Simmons cashed some coins in at a local market.* According to Sheri Philips, the Petitioner indicated that they were tips that he had received while working.

2. The Affiant, Sheri Phillips, stated that she "did not know what this is all about" until the *Officers told her the coins had been taken in a burglary.* Although probable cause for arrest may be based on credible hearsay, it clearly cannot be based on information that it is merely conclusionary without stating any of the underlying circumstances. See *Spinelli v. United States,* 393 U.S. 410 (1969); *United States v. Ventresca,* 380 U.S. 102 (1965); *Aguilar v. Texas,* 378 U.S. 108 (1964). The Officer's statement to the Affiant that the coins were taken in a burglary is conclusionary and moreover fails in any way to indicate that the Petitioner was a perpetrator of the purported crime. Mere suspicion can never be the basis for probable cause. See *United States v. Myers,* 450 F.2d 232 (3rd Cir., 1971); *Woods v. State,* 466 S.W.2d 741 (Tex. Crim. App., 1971); *Henry v. United States,* 361 U.S. 98 (1959).

Since the "four corners" of the complaint and affidavits failed to establish probable cause, the arrest of the Petitioner, Terry Gene Simmons, on a warrant based on the complaint and affidavit, was illegal.

The confession of the Petitioner was tainted by his illegal detention and the State has failed to show by clear and convincing evidence that the taint has been dissipated. *Wong Sun v. United States,* 371 U.S. 471 (1963) reveals that statements given to police by a person who

is under illegal arrest will be barred from admissibility unless it can be demonstrated by the State that the taint arising from the illegal arrest and illegal custody is dissipated and purged, the issue being whether the evidence has come about by exploitation of the illegal arrest and detention or instead by means sufficiently distinguishable to be purged of the primary taint. See *Phelps v. Decker,* 401 F.2d 232 (5th Cir., 1968). *Wong Sun's* exclusionary rule is equally applicable in both State and Federal Court. See *Collins v. Beto,* 348 F.2d 823 (5th Cir., 1965).

The rule relating to the effect of an illegal arrest on a confession is that it is the illegal detention, not the arrest, which the Supreme Court of the United States holds under some circumstances vitiates the confession. In other words, every confession which follows an illegal arrest is not *ipso facto* inadmissible but it is the illegal detention and not the arrest which vitiates the confession.

The following aspects of the Petitioner's illegal detention affirmatively indicates that the taint arising therefrom, had not been dissipated.

(1) *Narcotics addiction:* The Petitioner's two and one-half year addiction to narcotics (R-1862) is a factor critically depriving him of his faculties, as he would not have normal use of his physical and mental faculties (R-2216). See *United States v. Hollis,* 450 F.2d 1207 (5th Cir., 1971); *United States v. Quimones,* 452 F.2d 964 (10th Cir., 1971).

The fact of the Petitioner's present and past addiction to narcotics is established by: the testimony of Dr. William E. Rayburn indicating that the Petitioner was admitted to the Methadone Clinic for maintenance and withdrawal from heroin at the Texas Research Institute

of Mental Sciences on June 12, 1971, as a heroin addict (R-1909); the fact that Dr. Michael McDonald treated the Petitioner in the emergency room of Northwest Memorial Hospital on August 4, 1971, two days prior to this arrest as probably suffering from a drug overdose deduced from the fact that he was blue and not breathing (R-9281); the fact that approximately nineteen hours prior to the Petitioner's arrest he had "fixed" with two papers of heroin (R-1880); and that approximately 9:00 P.M. on August 6, 1971, the date of his arrest, the Petitioner felt a need for heroin during the initial stages of his interrogation (R-1867, 1968).

The recent Federal decision of *United States v. Watson,* 469 F.2d 362 (5th Cir., 1972) is relevant on the issue of physical condition. In *Watson,* supra, the Defendant, a diabetic, won a new hearing on the voluntariness of his confession which may have been obtained while he was under insulin shock.

It is established that intoxication can deprive one of his faculties. In *Logner v. North Carolina,* 260 F.2d 970 (M.D.N.C.) affirmed 392 F.2d 222 (4th Cir., 1968) where the accused was arrested while intoxicated and was given the full *Miranda* warnings on at least three occasions, the trial court excluded every statement he made in all interrogation sessions on the ground that his will was overborne by his excessive consumption of liquor. In *Gilpin v. United States,* 415 F.2d 638 (5th Cir., 1969), the Court stated:

> "We accept the testimony of the various government witnesses that the defendant did not appear intoxicated on the morning after his arrest but we must *assume* that there would be some impairment of the individual's mental faculties only fifteen hours after

he was arrested and described as staggering drunk and not appearing rational".

In the present cause, Terry Gene Simmons' condition was even more acute, given the fact that he was an addict (R-1909), that he had overdosed on heroin approximately two days prior to his arrest (R-2281) and had almost died, and that approximately nineteen hours prior to his arrest the Appellant had injected two papers of heroin into his body and that he began suffering withdrawals at 9:00 P.M. on the evening of his arrest (R-1867, 1868).

Dr. Samuel George, the Director of the Methadone program at the Texas Research Institute for Mental Sciences, stated that withdrawal would begin between eighteen and twenty-four hours after the last injection (R-2227). The Petitioner, Simmons, is squarely within that time period as interrogation began approximately twenty hours after his last injection (R-1867, 1868).

In response to a hypothetical question paralleling the Petitioner's case, Dr. George stated: "That the person in a situation such as you have just described would clearly be entering withdrawal symptoms and would include physical ones as well as psychological ones" (R-2214). "In my opinion and in my experience in dealing with many hundreds or thousands of addicts, I would say that his ability to withstand interrogation or to even give his concentration to any matter at hand other than his own feelings would be definitely diminished" (R-2215).

The *Gilpin* Court would *assume* impairment of an individual's mental faculties only fifteen hours after being arrested as drunk. The Petitioner here was undergoing a more acute impairment of his mental faculties as the result of physical withdrawal from heroin.

(2) *Age:* The age of the Petitioner, Terry Gene Simmons, is a factor critically depriving him of his faculties.

Decisions of the United States Supreme Court indicate that when an accused is young or ignorant, the factors affecting the defendant's faculties take on added weight. See *Clewis v. Texas*, 386 U.S. 707 (1967); *Gallegos v. Colorado*, 370 U.S. 49 (1962).

The Petitioner in the present cause had just turned eighteen years old by nine days at the time of his arrest (R-1867). Additionally, he had an eleventh grade education and registered IQ of approximately 84 (dull/normal) under the Ammons Quick test (R-2276, 2277).

Age and intelligence levels are relevant in determining if the Petitioner was critically deprived of his faculties. See *Townsend v. Sain*, 372 U.S. 293 (1963); *Haley v. Ohio*, 322 U.S. 596 (1948). This factor is further illustrated in *Gilbert v. Beto*, 274 F.Supp. 847 (S.D. Tex., 1968) where the fact that the defendant was eighteen years old and had a low IQ was held to be a crucial factor in the reversal of the case.

(3) *Psychological coercion.* Psychological coercion critically deprived the Petitioner of his faculties.

The quality and depth of coercion is evidentiary on the issue of dissipation of the taint arising from the Petitioner's illegal detention. See *Harney v. United States*, 407 F.2d at 589 (5th Cir., 1969); *Harris v. Beto*, 367 F.2d 567 (5th Cir., 1966). Although the polygraph instrument in and of itself will not make a confession involuntary, it nevertheless is a factor which should be considered in determining whether a defendant was critically deprived of his capacity for self-determination. See *Collins v. State*, 352 S.W.2d 841 (Tex. Crim. App., 1962); *Fernandez v.*

State, 353 S.W.2d 434 (Tex. Crim. App., 1962); *Webb v. State*, 291 S.W.2d 331 (Tex. Crim. App., 1956).

In the present cause, the polygraph was used as a form of psychological coercion, thereby limiting the Petitioner's faculties. It is undisputed that the mere sight of the polygraph machine has induced confessions (R-2051, 2239).

The Petitioner had no prior experience with the polygraph (R-1819) and was confronted with the instrument without his consent (R-1872, 1873) by an experienced polygraph examiner (R-2036 through 2044) who gave no warnings as to his constitutional rights (R-1833).

Furthermore, the false statement that the coins that the Petitioner possessed were positively identified as coming from the decedent's home (R-1702, 1703, 1704, 1765) amounted to psychological coercion sufficient to indicate the confessions were reaped from his illegal detention.

B. *The Petitioner was held and interrogated in an incommunicado atmosphere.* On the evening of his arrest, the Petitioner was held incommunicado in a 8′ x 8′ room in the back hallway of the Houston Police Department (R-1779) and was prevented from consulting with his retained counsel (R-1852, 1855). Additionally, during this incarceration the Petitioner requested his mother, but was ignored (R-1865). See *People v. Burton*, 491 P.2d 793 (Cal., 1972); *Commonwealth v. Moses*, 387 A.2d 136 (Pa., 1972); *Commonwealth v. Harmon*, 269 A.2d 744 (Pa., 1970). Also Petitioner's brother, Sam Simmons, tried to locate the Petitioner several times on the night of his arrest, he tried the FBI, County and City, but "no one seemed to know where he was" (R-2251).

The illegal detention of the Petitioner for the August 3, 1971, burglary was intended to create this incommunicado

atmosphere so as to enable the police to question the suspect more persistently and effectively than otherwise would have been possible. Indeed, Officers of the Houston Police Department readily admit that although they arrested the Petitioner for the August 3, 1971 burglary. their main reason in questioning him was to try to locate a missing girl (R-1647, 1766, 1820). This establishes the very rationale for *Wong Sun's* exclusionary rule to prevent pretext arrests where an excludable piece of evidence is the underlying target of police activity.

The intent of the Officers to create this incommunicado atmosphere is further manifested by the fact that the Petitioner was denied the opportunity to consult with his parents, relatives and attorney during his detention.

> "The fact of lengthy interrogation or incommunicado incarceration is strong evidence that the accused did not validly waive his rights and under these circumstances the fact that the individual made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so". *Miranda v. Arizona*, 384 U.S. 476 (1966).

C. Another aspect of the Petitioner's illegal arrest which indicates the taint of the illegal detention had not dissipated was the denial of food.

The Supreme Court has long indicated "inadequate food" impairs one's faculties. See *Payne v. Arkansas*, 356 U.S. 560 (1968); *Clewis v. Texas*, 386 U.S. 712 (1967). In the present cause, Terry Gene Simmons was given no food during the interrogation process; promptly after making the desired oral and written confession he was rewarded with a hamburger and a malt (R-1679, 1708, 1786). Of more consequence is the fact that Officer Zeringue of

the Houston Police Department readily admitted that food was "available"; however, he further stated "we were still taking the written confession and after that was concluded he was given a hamburger and a malt" (R-1786). Given the fact that this was the Petitioner's first food in over twenty-four hours (R-1867), it is obvious that food as a reward was used to achieve the response that the police inquisitors desired, i.e., a confession.

3. THE COURT BELOW ERRED IN OVERRULING PETITIONER'S MOTION TO SUPPRESS HIS CONFESSIONS WHICH WERE TAKEN IN THE "PLANNED" ABSENCE OF COUNSEL.

Miranda v. Arizona, 384 U.S. 436 (1966) specifically provides that *preventing a defendant's attorney from consulting with his client is a violation of the Sixth Amendment right to assistance of counsel and excludes any statement made in its wake.* (Emphasis added)

The Petitioner in the present cause of action falls squarely within the precepts established in *Miranda v. Arizona,* supra, as after continuous interrogation and only approximately fifteen minutes *before* the Petitioner made is initial statement the Petitioner's retained counsel was informed by the Houston Police Department that "the Defendant had been put up for the night and was not being interrogated" (R-1855, 1857). As a matter of law, this misleading statement precluded effective assistance of counsel.

The record and evidence reflect that on August 6, 1972, Attorney John Swain of Houston, Harris County, Texas, was employed by the Petitioner's parents to represent the Petitioner (R-1851). At approximately 10:30 to 11:00

P.M. on August 6, 1971, Attorney Swain contacted the Homicide Division of the Houston Police Department by phone, informing the Officer on duty that he, Swain, represented the Petitioner (R-1858). Mr. Swain inquired as to the whereabouts of the Petitioner and he was told that the Petitioner had been put up for the night and was not being interrogated (R-1855, 1857). *At that very moment* the Petitioner was being subjected to the trained interrogation of Officer Atkins, the State's polygraph examiner (R-1747, 1748).

Since the Petitioner was being interrogated by Officer Atkins from 10:10 P.M. until 11:15 P.M. on August 6, 1971, when he gave his initial statement (R-1747, 1748, 1749) and the record reflects that Attorney Swain called at approximately 10:30 to 11:00 P.M. of that same night (R-1858), it can be deduced that the false information given Attorney Swain as to the Petitioner's whereabouts was in fact given during the heat of interrogation and only fifteen minutes *before* the Petitioner made a statement. As a matter of law, this precluded effective assistance of counsel.

The *Miranda* rule applies to preclude as unconstitutional the admission of statements resulting from in-custody interrogation after known retainer or appointment of counsel and without counsel's approval, therefore, it cannot be claimed that the Petitioner's statement given only fifteen minutes *after* the illegal conduct of the police in denying him counsel amounted to a waiver.

Given this primary illegality, Petitioner's oral statement rendered at the very hour of this deception would be inadmissible. Turning to the causal connection between

this and his subsequent written confession, at 11:35 P.M., August 6, 1971, immediately after making an oral statement, the Petitioner was forcefully taken to the purported scene of the crime (R-1855). Having failed to find anything at the scene, the police returned the Petitioner to the Station at approximately 1:30 A.M. on the morning of August 7, 1971 (R-1676) where they continued his interrogation but this time "armed" with his earlier admission. *U. S. v. Pierce,* 397 F.2d 131 (4th Cir., 1968); *Harney v. U. S.,* 407 F.2d 590 (5th Cir., 1969).

Despite the fact that it is claimed the Petitioner was warned before giving his written statement, because of the State's earlier unconstitutional conduct in procuring his oral statement, this subsequent warning prior to that written statement from the Petitioner's point of view came at the *end* of the interrogation process. *Westover v. U. S.,* 384 U.S. 496 (1966). Furthermore, "armed" with this earlier illegal statement made without counsel, the State was given a decided psychological advantage. As the Supreme Court stated in *U. S. v. Bayer,* 331 U.S. 532 (1946); "Of course, after an accused has once let the cat out of the bag by confession, no matter what the inducement he is never thereafter free of the psychological and practical disadvantages of having confessed".

Therefore, the State having prevented the effective assistance of counsel by the use of misleading and patently false statements as to the Petitioner's whereabouts, the subsequent oral and written statements made in the wake of that illegality are inadmissible as a matter of law. *Miranda v. Arizona,* supra.

4. THE COURT BELOW ERRED IN REFUSING TO SUPPRESS THE PETITIONER'S CONFESSION IN VIEW OF THE EVIDENCE WHICH SHOWED IT TO BE INVOLUNTARY AND INADMISSIBLE AS A MATTER OF LAW.

The Fifth Amendment provides that "No person shall be compelled in any criminal case to be a witness against himself" and it has been interpreted to exclude an involuntary confession. *Brown v. Mississippi,* 297 U.S. 278 (1936); *Brown v. U. S.,* 186 U.S. 532 (1897). A confession which is involuntary, based upon the totality of the circumstances surrounding its seizure is inadmissible. *Greenwald v. Wisconsin,* 390 U.S. 519 (1968); *Brooks v. Florida,* 389 U.S. 413 (1968); *Clewis v. Texas,* 386 U.S. 707 (1967); *Davis v. North Carolina,* 384 U.S. 907 (1966); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Beecher v. Alabama,* 389 U.S. 35 (1963); *Haynes v. Washington,* 373 U.S. 503 (1963). In the case of *Rogers v. Richmond,* 365 U.S. 534, 540 (1961), it was stated by the United States Supreme Court:

> "Our decisions under the Due Process Clause of the Fourteenth Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion either physical or psychological cannot stand. This is so not because such confession are unlikely to be true, but because the message used to extract them offend an underlining principle in the enforcement of our criminal laws; that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independent and freely secured and may not by coercion prove its charge against an accused out of its own mouth."

Turning to the circumstances in the present cause, the evidence reflects the following:

A. "The Petitioner was withdrawing from the effects of narcotics at the time the confession was given and was in a weak and sickened mental and physical condition."

The Petitioner, Terry Gene Simmons, had a two and one-half year addiction to heroin at the time of his arrest (R-1862, 1909) which was known to the police (R-1787). Additionally, two days prior to his arrest, the Petitioner overdosed on heroin and was treated at Northwest Memorial Baptist Hospital where he almost died (R-2281). After his release from the hospital and only nineteen hours before his arrest, he injected another two papers of heroin (R-1880) which caused him to suffer withdrawals during the initial stages of interrogation by the police (R-1867, 1868).

Narcotics addiction is a form of intoxication and may raise the issue of involuntariness. *U. S. v. Hollis,* 450 F.2d 1207 (5th Cir., 1971); *U. S. v. Quimones,* 452 F.2d 1964 (10th Cir., 1971); *Henley v. State,* 228 So.2d 602 (Miss., 1969). The Court in the *Logner v. North Carolina,* 260 F. Supp. 970 (M.D.N.C., 1966) held that although the defendant was given the full *Miranda* warnings on at least three occasions, the trial court excluded every statement he made in all interrogation sessions on the ground that his will was overborne by his excessive consumption of liquor.

Dr. Samuel George, Director of the Methadone program at the Texas Research Institute for Mental Sciences, in response to a hypothetical question paralleling Defendant's case stated "That the person in a situation such as you

have just described would clearly be entering withdrawal symptoms and would include physical ones as well as psychological ones" (R-2214). He further stated "In my opinion and in my experience in dealing with hundreds or thousands of addicts, I would say that his ability to withstand interrogation or to even give his concentration to any matter at hand other than his own feelings would be definitely diminished" (R-2215).

In *Gilpin v. U. S.*, 415 F.2d 638 (5th Cir., 1969), the Court stated:

> "We accept the testimony of the various government witnesses that the defendant did not appear too intoxicated on the morning after his arrest, but we must *assume* that there would be some impairment of the individual's mental faculties only fifteen hours after he was arrested and described as staggering drunk."

In the present case, the Petitioner's condition was even more acute, given the facts that he was an addict (R-1909), that he had overdosed on heroin approximately two days prior to his arrest (R-2281), that he had almost died, that approximately nineteen hours prior to his arrest he had injected two papers of heroin into his body and that he began suffering extreme withdrawals at approximately 9:00 on the evening of his arrest during which the initial stages of his interrogation took place (R-1867, 1868).

The recent federal decision of *United States v. Watson*, 469 F.2d 362 (5th Cir., 1972) is relevant on the issue of physical condition. In *Watson*, supra, the Defendant, a diabetic, won a new hearing on the voluntariness of his confession which may have been obtained while he was

under insulin shock. Moreover, the Court held that the State had the burden to present expert "medical" testimony to establish that the Defendant was not suffering from insulin shock and the mere observations of medically untrained laymen are insufficient.

B. The Petitioner made a statement only after he had been confronted with a polygraph or lie detector machine under the control of an experienced Officer of the Houston Police Department.

From the totality of the circumstances, the polygraph machine becomes a viable factor in determining whether a confession was involuntary. *Fay v. Noia,* 372 U.S. 391 (1963); *Lynumn v. Illinois,* 372 U.S. 528 (1963); *Collins v. State,* 352 S.W.2d 841 (Tex. Crim. App., 1962); *Fernandez v. State,* 353 S.W.2d 434 (Tex. Crim. App., 1962).

Significantly, both the State and the defense readily *admit* that the mere sight of the polygraph machine and explaining its capabilities can and has induced a confession without its actual use (R-2051, 2239).

The following is the testimony of Mr. Douglas Clark, an expert on the usage of a polygraph machine, whose experience included the giving of approximately 2,500 tests (R-2239):

A. (By defense counsel)

"In your experience as an expert polygraph examiner, not concerning this case but in generalities, is it a recognized fact that the instrument can serve as a psychological crutch or club, depending upon the individual, and induce a subject to confess when he is presented with the

element of the instrument's accuracy and infallibility?

A. Yes, sir. I have found that it is a recognized fact in the profession that the instrument itself serves either as a crutch or perhaps a club depending upon the individual and it would induce an individual to confess when he was confronted with the actual infallibility or accuracy of the instrument which the examiner is trained to explain. (R-2239).

Q. Have you experienced or had occasion to observe individuals who have refused to confess for a long period but who were taken to a polygraph examining room and there confronted with the machine and have had their resistance to confession broken?

A. Yes, sir, I have had."

In the present cause, Officer Atkins was an experienced polygraph examiner, in fact, his educational background included textual materials with chapters on "trickery" (R-2036-2044). The Petitioner, Simmons, had never taken a polygraph examination before (R-1819). After having confronted the Petitioner with the machine (R-1818), Officer Atkins bolstered its infallibility by telling the Petitioner that the police had identified the money he had cashed in at a local market as coming from the decedent's home (R-1812), which fact was totally false (R-1702, 1704, 1765). Additionally, the testimony revealed that Officer Atkins was 6′ 3″ tall and weighed approximately 265 lbs. while the Petitioner was a diminutive 5′ 4″ and 120 lbs. (R-1830).

Coupled with the fact that Officer Atkins gave no warning to the Petitioner (R-1833), the sheer physical appearance and the stressed infallibility of the machine

were imposing factors which undoubtedly had a chilling effect on the Petitioner. The mere fact that the Petitioner confessed shortly after being faced with the polygraph machine during the pretest interview provides strong evidence of the psychological dominance which the police sought to achieve through the polygraph routine.

C. The Petitioner's age and intelligence are vital factors in the "totality of the circumstances" that made his confession involuntary.

The Petitioner in the present cause had just reached his eighteenth birthday nine days prior to the date of his arrest (R-1867); and he had an eleventh grade education; he registered an IQ of approximately 84 under the Ammons Quick Test (a reading indicating a dull/normal intelligence level) (R-2277). Because of his age and intelligence level, Simmons was overwhelmed by the circumstances of his inquisition. *Haley v. Ohio,* 322 U.S. 596 (1948). In point are the Supreme Court decisions of *Clewis v. Texas,* 386 U.S. 707 (1967) and *Gallegos v. Colorado,* 370 U.S. 49 (1962) indicating that when an accused is young or ignorant the factors effecting the voluntariness of his confession take on added weight.

D. The inadequacy of food and sleep was used by the police interrogators to induce Petitioner's confession.

"Inadequate food" impairs one's faculties and goes to the voluntariness of a confession. *Clewis v. Texas,* 386 U.S. 707 (1967). In the present cause, the Petitioner had not eaten for over twenty-four hours (R-1867) prior to being given a hamburger and a malt by officers of the Houston Police Department (R-1786). Food was used as a psychological mechanism to reward the Appellant for confess-

ing. This claim is substantiated by Officer Zeringue's testimony when he stated food was "available"; however, "we were still taking the written confession and after that was concluded he (Terry Gene Simmons) was given a hamburger and a malt" (R-1786).

Furthermore, the Petitioner, Simmons, was arrested at 7:30 P.M., August 6, 1971 (R-1651) and was not allowed to sleep until 3:30 A.M. on August 7, 1971 after continuous interrogation (R-1785). Thus, the questioning took place not during normal hours, but late at night after Simmons had been up all day. *Spano v. New York*, 360 U.S. 322 (1959).

E. By the use of patently false information, the Houston Police Department precluded counsel for the Petitioner from rendering effective assistance at the interrogation stage of the investigation.

In the present cause, Mr. John Swain, a practicing attorney, was retained by the Petitioner's mother to represent her son, Terry Gene Simmons (R-1851). On the evening of the Petitioner's arrest, August 6, 1971, Attorney Swain called the Houston Police Department Homocide Division at approximately 10:30 to 11:00 P.M. informing them that he represented the Appellant (R-1858). He was then told that "the Defendant had been put up for the night and was not being interrogated" (R-1855), 1857). This misleading statement was patently false as the record reflects that at approximately 10:10 P.M. until 11:15 P.M. on August 6, 1971, the Petitioner was being interrogated by Officer Atkins, the State's polygraph examiner (R-1747, 1748, 1749).

It is submitted that the misleading statement given Attorney Swain that the Petitioner had been put up for the

night and was not being interrogated was calculated either unintentionally or by design to lead counsel to believe that his assistance was not presently necessary due to the fact that the interrogation process would not commence until the following morning.

F. The Petitioner, Simmons, was never warned by a Magistrate concerning charge of murder.

The evidence before this Court reflects that the Petitioner was never given a warning by a magistrate, pursuant to Article 15.17, V.A.C.C.P., concerning his rights in connection with the instant murder case or any offense growing out of that transaction. Article 15.17 specifically states that one of the enumerated purposes of the warning is to "inform in clear language the person arrested of the accusation against him." The only warning given by Judge Cannon of the Municipal Court of the City of Houston was a warning given at 8:10 P.M. on August 6, 1971 in connection with a burglary which was alleged to have occurred on August 3, 1971 (R-1762, 1890). The Petitioner was warned *only* as to an August 3 burglary, with no mention of the unrelated offense of murder which he was subsequently charged with (R-1752, 1890).

If knowledge of the particular crime suspected is withheld from him, the defendant could not intelligently make a decision as to whether he wanted counsel or wished to assert his privilege against self-incrimination. *Shenk v. Ellsworth,* 293 F. Sup. 26 (D.C. Mont., 1968); *United States ex rel Kern v. Maroney,* 275 F. Sup. 435 (W.D. Pa., 1967).

In conclusion, your Petitioner submits that the totality of the circumstances demands the conclusion that the

confession was involuntary and inadmissible as a matter of law. These circumstances included a sickened mental and physical condition induced by narcotic withdrawal, confrontation with a polygraph machine, Petitioner's youthfulness and low intelligence level, inadequacy of food and sleep during interrogation, patently false information by the Houston Police Department which precluded counsel for the Petitioner during interrogation, and the withholding from him knowledge that he was suspected of murder which made it impossible for him to intelligently waive his right to counsel or to assert his privilege against self incrimination.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

By_____

JIMMY JAMES
620 Houston Bar Center Building
723 Main Street
Houston, Texas 77002
227-8191

Counsel for Petitioner

Dated:_____

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable John Hill, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas, counsel for the Respondent. I further certify that all parties required to be served have been served.

JIMMY JAMES
620 Houston Bar Center Building
723 Main Street
Houston, Texas 77002

Counsel for Petitioner